



Greenbelt Warehouse Limited v Sheikh; Sheikh (Plaintiff); Gulf African Bank Limited (Defendant) (Environment & Land Case 290 of 2019) [2022] KEELC 13515 (KLR) (30 September 2022) (Ruling)

Neutral citation: [2022] KEELC 13515 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 290 OF 2019
LC KOMINGOI, J
SEPTEMBER 30, 2022**

BETWEEN

GREENBELT WAREHOUSE LIMITED PLAINTIFF

AND

ABDULLAHI MOHAMED SHEIKH DEFENDANT

AND

ABDULAHI MOHAMED SHEIKH PLAINTIFF

AND

GULF AFRICAN BANK LIMITED DEFENDANT

RULING

1. This is the notice of motion dated September 2, 2021 brought under section 1A, 1B and 3A of the *Civil Procedure Act*, Cap 21 and order 2 rule 15 of the *Civil Procedure Rules, 2010* and all other enabling provisions of the law.
2. It seeks orders:-
 1. The defendant's defence and counterclaim dated July 1, 2020 and filed on July 3, 2020 be struck out.
 2. Costs of this application be paid by the defendant.
3. The grounds are on the face of the application and are set out in paragraphs (a) to (p).
4. The application is supported by the affidavit sworn by Lawi Sato, legal officer of the defendant (in the counterclaim) sworn on the September 2, 2021.



5. On the March 7, 2022, Ms Nganga holding brief for Mr Maosa who had just come on record for the plaintiff (in the counterclaim) sought and was granted leave to file a response within seven (7) days. The matter was then fixed for mention on April 20, 2022.
6. On the April 20, 2022, Mr Wawire for the defendant (in the counterclaim) informed the court that Mr Maosa for the plaintiff (in the counterclaim) had sought a further fourteen (14) days to put in a response. The court then granted a further fourteen (14) days and directed parties to file and exchange written submissions. The matter was fixed for mention on June 21, 2022.
7. On the June 21, 2022 there was no appearance for the plaintiff (in the counterclaim). No response and or submissions had been filed on his behalf. Mr Ongeri who was appearing for the plaintiff (in the main suit) told the court that the plaintiff did not wish to oppose the application. The court then fixed this matter for ruling. By the time of writing this ruling there is no response and submissions filed on behalf of the plaintiff (in the counterclaim).
8. As stated hereinabove the court with the consent of the parties directed that the notice of motion be canvassed by way of written submissions.

The defendant's (in the counterclaim) submissions

9. They are dated May 13, 2022. Counsel submits that the defendant's counterclaim does not disclose any reasonable cause of action against the bank because this honourable court cannot declare to the effect that the charged properties were sold below market value as prayed in the counterclaim because two previous High Court decisions have held to the contrary.
10. That this court cannot declare to the effect that the transfer and registration of the said properties to the plaintiff is illegal and neither can it revoke the said transfer and registration as prayed because two previous High Court decisions have held to the contrary.
11. The said decisions of the High Court were to the effect that the properties were lawfully sold and transferred to the plaintiff in HCCC E416 of 2018 Abdullahi Mohamed Sheikh vs Gulf Bank Ltd & 2 Others; HCCC No 501 of 2016; Abdullahi Mohammed Sheikh vs Gulf Bank Ltd. The chargor has not applied to set aside the orders in the two decisions. The chargor still owes the bank Kshs 35,815,499/81 as at January 22, 2019.
12. He further submitted that the plaintiff does not have a reasonable cause of action against the bank as the orders sought are contrary to the two High Court decisions. He has put forward the case of *Francis Joseph Kamau Ichatha vs Housing Finance Company of Kenya Ltd* [2014] eKLR.
13. He also submitted that the defendant's counterclaim is frivolous, vexatious and an abuse of the court process as the High Court has already made two rulings. He has put forward the cases of *County Council of Nandi vs Ezekiel Kibet Rutto & 6 Others* [2013] eKLR; *Trust Bank Ltd vs H. S. Amin & Company Ltd & Another* [2000] eKLR; *Tirus Macharia Mwangi & Another vs Bank of Africa Kenya Ltd & Another* [2022] KEHC 87 (KLR); *Kivanga Estates Ltd vs National Bank of Kenya Ltd* [2017] eKLR.
14. He prays that the application be allowed.
15. I have considered the notice of motion, the grounds and the affidavit in support. I have also considered the written submissions and the authorities cited. The issues for determination are:-
 - i. Whether the defendant's counterclaim should be struck out.
 - ii. Who should bear costs of this application?



16. The defendant's counterclaim against the bank is as follows:-
- ' (i) A declaration that the charged properties were sold below market value and hence the public auction was null and void.
 - (ii) A declaration that the transfer and registration of the suit properties to the plaintiff was illegal and the resultant title deeds be revoked.
 - (iii) Costs of the suit'.
17. It is this claim that the defendant (in the counterclaim) prays that it be struck out. Order 2 rule 15 of the [Civil Procedure Rules, 2010](#) provides that:-
- ' (1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—
 - a. it discloses no reasonable cause of action or defence in law; or
 - b. it is scandalous, frivolous or vexatious; or
 - c. it may prejudice, embarrass or delay the fair trial of the action; or
 - d. it is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.
 - (2) No evidence shall be admissible on an application under subrule (1)(a) but the application shall state concisely the grounds on which it is made.
 - (3) So far as applicable this r. shall apply to an originating summons and a petition.'
18. It is trite law that the court's power to strike out pleadings is to be exercised sparingly and cautiously. This is because the court exercises the power without being fully informed on the merits of the case through discovery and oral evidence. This was stated so in the case of *DT Dobie & Company (Kenya) Ltd vs Muchira* [1982] KLR 1 where it was held;
- ' No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to go forward for a court of justice ought not to act in darkness without the full facts of a case before it'.
19. This is not the case in the instant suit. It is not in dispute that the defendant herein instituted two other suits in the High Court; HCCC No E416 of 2018; Abdullahi Mohammed Sheikh vs Gulf Bank Ltd & 2 Others; HCCC No 501 of 2016; Abdullahi Mohammed Sheikh vs Gulf Bank Ltd. There are orders granted in the above suits. The defendant has not applied for them to be set aside.



20. This would make the defendant's claim frivolous. In the case of *Trust Bank Ltd vs HS Amin & Company Ltd & Another* [2000] eKLR it was stated as follows:

' In *Bullen & Leake and Jacobs precedents of pleadings (12th Edition)* on chapter dealing with striking out pleadings at page 145 it stated:

'A pleading or an action is frivolous when it is without substance or groundless or fanciful and is vexatious when it lacks bona fides and is hopeless or offensive and tends to cause the opposite party unnecessary anxiety, trouble and expense.'
Lastly a pleading which is abuse of the process of the court really means in brief a pleading which is a misuse of the court machinery of process'.

21. I agree with the bank's submissions that the defendant is using the court process to frustrate the bank's right to recover the loan owed by the defendant. The counterclaim raises no triable issues in light of the orders in the two suits and is an abuse of the court process.

22. In the case of *Kivanga Estates Limited vs National Bank of Kenya Ltd* [2017] eKLR, the Court of Appeal held as follows:-

' We entertain no doubt whatsoever that by engaging nearly all levels of the court system for the last 27years!, filing one suit in one court after the other, moving from Embu, Meru, to Nairobi, amounts to gross abuse of the process of the court. The learned judge properly balanced the two competing interests: the public interest in ensuring that there is finality in litigation (and that a party should not be stung? twice in the same matter), and the private interest of a party guaranteed by the *Constitution* to access the courts. He kept in mind the fact that in all the circumstances, the appellant was misusing or abusing the court process by seeking to raise before it the issue which it had raised before in previous suits, some of which may still be pending. The court will look closely at the conduct of the party bringing subsequent proceedings in respect of the same matter in order to prevent abuse of its process and it has the power, in case of abuse of its process to ex debito justitiae prevent it.

There is no greater duty for the court than to ensure that it maintains the integrity of the system of administration of justice and ensure that justice is not only done but is seen to be done by, amongst other measures, stopping litigations brought for ulterior and extraneous considerations. The courts, litigants and counsel are enjoined by both the *Constitution* and the law to assist the court to further the overriding objective for the just determination of the proceedings; the efficient disposal of the business of the court; the efficient use of the available judicial and administrative resources; the timely disposal of the proceedings, and all other proceedings in the court, at a cost affordable by the parties. We believe the learned judge had this in mind when he warned counsel for the appellant of the risk of an order of costs being made personally against him if he continued to bring more actions on the same dispute.

In the result and with respect we agree with the conclusion of the learned judge that although none of the previous suits were determined on merit, the fact that they were abandoned before determination and fresh ones brought was in itself an abuse of the process of the court sufficient under order 2 rule 15 (1) (b) and (d) to justify striking out.'

As stated earlier the application is not opposed. The defendant was given an opportunity to file a response but he neglected to do so.



23. In conclusion, I find merit in this application and the same is allowed in the following terms:-
- a. That the defendant's defence and counterclaim dated July 1, 2020 and filed on July 3, 2020 is hereby struck out.
 - b. That costs of this application be borne by the defendant.
- It is so ordered.

DATED, SIGNED AND DELIVERED IN NAIROBI ON THIS 30TH DAY OF SEPTEMBER 2022.

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L KOMINGOI

JUDGE

In the presence of:-

Mr Ongeru advocate for the Plaintiff

No appearance for the Defendant

Steve - Court Assistant

